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No. 97

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

UNITED STATES OF AMERICA,
Appellant,

vs.

JAMES HOFFMAN,
Appellee.

On Appeal from the District Court of the United States for the District of Columbia

BRIEF FOR THE APPELLEE

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OPINIONS BELOW

The opinion of the District Court (R. 28-30) is reported at 68 F. Supp. 53. The opinion of the United States Court of Appeals for the District of Columbia (R. 38-39), certifying the case to this Court pursuant to the Criminal Appeals Act, is reported at 161 F. 2nd. 881.

JURISDICTION

The order of the District Court dismissing the rule to show cause was entered October 8, 1946 (R. 30). Notice of appeal to the United States Court of Appeals for the District of Columbia was filed October 29, 1946 (R. 31). On March 31, 1947, the government moved to certify the case to the Supreme Court pursuant to the Criminal Appeals Act (R. 32-34), and on May 5, 1947, the Court of Appeals entered an order certifying the case to this Court (R. 40). On June 2, 1947, this case was set down for argument to follow *Shapiro vs. United States*, No. 49, this Term.

The jurisdiction of this Court to review the District Court's order on direct appeal is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended by the Act of May 9, 1942, c. 295, 56 Stat. 271, 18 U. S. C., Supp. V, 682, commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, as amended, 28 U. S. C. 345.

QUESTIONS PRESENTED

1. Whether Appellee who, in compliance with an administrative subpoena, produced business records required to be kept by a regulation promulgated by the Price Administrator, thereby obtained immunity from the present prosecution.

2. Whether the appeal in this case was properly taken by and on behalf of the United States.

ARGUMENT

I

Appellee Had a Privilege against Self-Incrimination with Respect to Records of His Business and Obtained Immunity under Section 202 (g) of the Emergency Price Control Act

The question here to be decided is one which Appellee believes has never been directly presented to this Court for determination. Upon analysis, the question resolves itself into two parts. First, whether the privilege against self-incrimination under the Fifth Amendment extends to and includes the compulsory production of an individual's business records of the kind ordinarily made in the normal course of trade, but which are required to be made and kept by administrative regulation; and second, if the Fifth Amendment, in itself, affords no protection, whether Section 202 (g) of the Emergency Price Control Act extends immunity to such case.

The privilege against self-incrimination as protected by the Fifth Amendment extends to books, papers and other records, as well as to oral testimony. See *Boyd vs. United States,* 116 U. S. 616. The principal contention urged by the government on this appeal, however, is that the protection otherwise afforded is destroyed if the books and records have been required to be kept in accordance with law so that it cannot be said that such records are truly private records.

In *Wilson vs. United States,* 221 U. S. 361, upon which great reliance is placed by the government, this Court held that a corporate officer called upon to produce corporate books and records could not claim protection under the Fifth Amendment. This was on the theory that such officer was merely the custodian of them. It is true that in the opinion, Mr. Justice Hughes referred to public records kept

by public officials and records required by law to be kept by individuals as being beyond the constitutional protection, but such reference does not compel the application of the doctrine, even if one accepts the doctrine, to the extent herein suggested by the government. Moreover, such statements were but dicta and unnecessary to the decision and, while admittedly accepted by some lower courts, has never been adopted by this Court.

The public records doctrine, as enunciated in the *Wilson* case, is predicated upon the theory that one who engages in a regulated and controlled business, such as the drug and liquor business, in which there is a statutory requirement that certain records be kept, voluntarily waives his privileges against self-incrimination by the acceptance of the license to engage in such regulated business. These records assume the character of public records on the stated ground that by virtue of their nature, an individual "in assuming their custody (he) has accepted the incident obligation to permit inspection."

The Emergency Price Control Act, on the other hand, did not have for its purpose the regulation or control of any particular business, peculiarly subject to governmental control, but had rather the purpose of controlling the general economy of the entire country during a period of national crisis by the establishment of price control. In accordance with this purpose, price control became universal and was applied to practically every commodity and made applicable to practically every business, whether large or small in size, simple or complex in organization. One of the powers given the Administrator was the power to require "*any* person who is engaged in the business of dealing with *any* commodity * * * to make and keep records and * * * by subpoena require any such person to appear and testify, or to appear and produce documents, or both, at any designated place." It thus appears that Congress did not, as a condition of doing

business, require an individual to keep and produce records for the purpose of regulating in the public interest that particular business, but rather gave to the Administrator of the Office of Price Administration the right, by regulation, to require the keeping of records in order to assist him in establishing price control. American business, under the Emergency Price Control Act, was not a regulated business in the sense necessary to render records required to be kept, public records within the meaning of the *Wilson* case.

To sustain the government's position would be to permit Congress, by legislation, to destroy constitutional safeguards. This Court has held this to be beyond Congressional power. See *Counselman vs. Hitchcock,* 142 U. S. 547. By one broad regulation, by a sweep of his pen, the Administrator, under the powers vested in him, could render all records of every type and description, of all businesses, quasi-public by a mere directive that such records "be made and kept", thereby directly and completely destroying the protection of the Fifth Amendment insofar as applicable to what would otherwise be private records of an individual businessman. Thus stated in its broadest aspect, the heart of the problem herein involved is presented. Perhaps the fear of the consequence of such a decision in favor of the government is what prompted Judge Learned Hand to make the following observation in *United States vs. Davis,* 151 F. 2nd. 140, 142, affirmed, 328 U. S. 582:

> "• • • moreover the rationale, (of some of the decided cases) has always been that, when it has become necessary to regulate a business in the public interest, those who continue in it thereafter must be taken to have assented to the conditions imposed. The consequences of this theory are indeed far-reaching; it is becoming more and more usual to regulate businesses in cases of public emergency, a phrase which is confessedly exceedingly elastic. If any person already engaged

in such a business must choose between abandoning his calling, or consenting to the surrender of his privilege against self-incrimination, when the regulations provide for inspection, the scope of the privilege is considerably circumscribed."

In the same case Judge Frank, concurring, stated that "it is fairly obvious that in the future many businesses will be subject to governmental inspection under constitutionally valid statutes. The complications of our modern industrial era make such inspection often socially desirable despite its irksomeness. To augment such irksomeness by coupling it * * * with the loss of a fundamental constitutional right would be to build up popular resistance to needed governmental action."

The privilege against self-incrimination is a fundamental, basic right of an individual equally as important—if not as broad in scope, perhaps—as the right of the government to regulate and control business in the public interest. To obtain, by implication, waivers of a constitutional protection as a condition of engaging in a public regulated and licensed business, which is the extent suggested by the doctrine set forth in the *Wilson* case, which Appellee does not concede to be the law, is one thing; it is a far different thing to impose upon every businessman under a price control statute, a loss of his constitutional protection to be safeguarded in his books, papers and records, by empowering a single government official by mere regulation to turn such books and records into public records. The mere statement of this latter proposition seems sufficient to demonstrate that our constitutional guarantees are grounded upon sterner and more substantial rock than this. To follow this argument to its logical conclusion, the protection of the Fifth Amednment can be made to depend, in the circumstance of the present case, upon the desires of one single individual, the Administrator.

That the keeping and inspection of a businessman's records might aid in the enforcement of price control, as the government argues, does not justify the destruction of the protection. As Mr. Justice Brandeis stated in his dissent filed in *Olmstead vs. United States*, 277 U. S. 438, 479: "And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Recent decisions of this Court in criminal cases too numerous and well known to cite, clearly demonstrate the principle that law enforcement, no matter how salutary, must yield to constitutional safeguards.

Carefully analyzed, the power given the Administrator falls within the condemnation of *Boyd vs. United States*, 116 U. S. 616. The power to require the keeping and production of *customary* and *usual* records by an individual in the case of price control, certainly can be no more valid than a statute requiring a person to produce his records when required for purposes of collecting revenue. The statute involved in the *Boyd* case provided that in all suits arising under the Revenue laws, the government attorney, by motion made to the court, could obtain inspection of any business book, invoice or paper belonging to the individual, and upon failure or refusal to produce such book, invoice or paper, the allegations made by government counsel of the facts which he expected to prove by such records, should be taken as confessed. This statute was held to be violative of the Fifth Amendment. Can it not be argued that a statute requiring the production of records in a court of law renders such records just as public, if at all, as a regulation requiring a record to be kept for purposes of inspection by an administrative official, as in

the Emergency Price Control Act, particularly where the records required to be kept include *all* records which the individual would ordinarily keep in the regular course of his business? To say, as the government does, that in one case the records remain private and secure under the Fifth Amendment, and in the other, they become public and beyond the protection of the Fifth Amendment, is to render our constitutional safeguards insubstantial and a sham. There is no room for valid distinction. To distinguish is to say that government power and autocracy, delegated to administrative subordinates, can override individual fundamental rights and privileges. As Justice Bradley said in the *Boyd* case, the compulsory production of a person's books and papers, to convict him of crime, is contrary to the principles of a free government. "It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."

In this respect, it is interesting and important to note that the Internal Revenue regulations, made by and pursuant to authority vested in the Commissioner of Internal Revenue, require taxpayers to keep books and records. See Regulation 111, Section 29.54-1. Section 2707 of the Internal Revenue Code imposes a penalty for failure to keep records required to be kept by the Commissioner. Although the problem was presented to this court in *United States vs. Murdock*, 284 U. S. 141, wherein the taxpayer was required to produce his records as against a claim of self-incrimination, no suggestion was made that the taxpayer's private records and papers were, by reason of the regulations, converted into public records and thereby placed beyond the protection of the Fifth Amendment. See *Steinberg vs. United States*, 14 F. 2nd 568 (2nd Cir.).

In *Davis vs. United States*, 328 U. S. 582, this Court stated, in effect, that ration coupons, although in the possession of a private individual, nevertheless were prop-

erty of the United States. Accordingly, it has been held that a theft of such coupons constitutes larceny from the United States. *Lotto vs. United States*, 157 F. 2nd 623 (8th Cir.). Things such as ration coupons are truly public records and as such would and perhaps should be subject to compulsory production because they are merely in the temporary custody of a private citizen. They are distinguishable, however, from business records, otherwise private, required to be kept. This distinction is clearly pointed out in the recent case of *Freeman vs. United States*, 160 F. 2nd 72 (9th Cir.) as follows:

> "Quasi-public records, not instrumentalities of a crime, may not be taken by government agents as an incident to a lawful arrest. They may be had only by consent or under lawful process such as a search warrant or subpoena *duces tecum*. There is a salutary reason for such a rule. Had a subpoena been issued for these documents Appellant would have had the opportunity to challenge its validity and, if he obeyed it, to gain immunity from later criminal prosecution, based on testimony produced under compulsion of such a subpoena". (Citing Section 202 (g) of the Emergency Price Control Act).

It is submitted, therefore, that the broad dictum of the Court in the *Wilson* case should not be followed but rather should be clearly circumscribed to the extent, at least, of excluding from the public records doctrine, records required of the nature involved in this case. Appellee does not contend that Congress is without authority to require the keeping of records, as an incident to the exercise of its powers, but merely that such requirement cannot work, under the circumstance of the present case, to the constitutional detriment of an individual. See *Ryan vs. Amazon Petroleum Corporation*, 71 F. 2nd 1 (5th Cir.), rev'd. on other ground, 293 U. S. 388. There the Court held that a producer of oil could be required, under the National Industrial Recovery Act, to keep and permit inspection of records although he did not operate under any right

or license derived from the Federal government; because the government had a right to know about conditions in the oil business just as it has a right to know what a citizen's income is so that it may be taxed. Presumably, the Court said, no crime has been committed by producer or taxpayer. "But if he has committed a crime and is entitled to withhold evidence of it, he should at the proper time and on the specific ground that disclosure would tend to incriminate him, assert the right to withhold the particular evidence." See also the observations of Mr. Justice Murphy in *Okla. Press Publishing Company vs. Walling*, 327 U. S. 186, 218.

Referring specifically to Section 202 (g) of the Emergency Price Control Act, a proper interpretation of the language of that Section compels acceptance of the decision of Justice Holtzoff in the court below. Section 202 is clear and unambiguous. By its terms the Administrator of the Office of Price Administration is invested with broad authority to command inspection and production of books and records. Section 202 (b) authorizes him to require any person dealing in any commodity "to make and keep records and other documents, and to make reports", and gives him the power to require, by subpoena, any person to appear and testify *or* to appear and produce documents. Under Section 202 (e) he may invoke the assistance of a District Court to compel compliance with his subpoena. Section 202 (g) provides that no person shall be excused from complying with *any requirements* under Section 202, because of his privilege agains self-incrimination but makes applicable to "any individual, specifically claiming such privilege the 'immunity provisions' of the Compulsory Testimony Act of 1893". Necessarily included within the protection of Section 202 (g) is the production of records required to be kept by the Administrator under the authority of that Section. The language clearly requires the keeping of records, when ordered, but grants immunity

in the event they are subpoenaed and the privilege is claimed. See report of Senate Committee on Banking and Currency, SEN. REP. No. 931 (1942), p. 21. The object of the requirement of the keeping and inspecting of records, was obviously to provide the Administrator with data so that price schedules and regulations could be formulated with respect to the various industries and businesses. The obvious purpose was information and not prosecution. The fact that reports and records are required will necessarily tend to prevent a crime that would be disclosed thereby, but if such a crime was disclosed, the privilege against self-incrimination could be invoked. See *Ryan vs. Amazon Petroleum Corporation*, 71 F. 2nd 1, 8 (5th Cir.). See also *Freeman vs. United States*, 160 F. 2nd 72 (9th Cir.). Compare *Spevak vs. United States*, 158 F. 2nd 594, 597 (4th Cir.).

Congress, having given to the Administrator express authority to require the keeping of records, without limitation, and in the same Section having granted immunity to one claiming his privilege against self-incrimination, must be conclusively presumed to have deliberately intended to include within the broad term "any requirements under this Section", records required by the Administrator to be kept. To limit Section 202 (g) under the public records doctrine, would be to usurp the legislative power and write into the Act something which is not there.

There is nothing inconsistent in granting immunity to one who produces books and records required by law to be kept. The Compulsory Testimony Act of 1893, incorporated into Section 202 (g), specifically extends immunity to one required to produce "books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission", 49 U. S. C. A. Sec. 46. Section 6 of the Interstate Commerce Act (49 U. S. C. A. § 6) specifically provides for the keeping and filing of certain records, and particularly tariffs, which as indicated above,

is by name included in the types of documents falling within the Compulsory Testimony Act; so that it cannot be said, as the government now contends, based upon dictum in the *Wilson* case, that the immunity provision of the Compulsory Testimony Act does not cover quasi-public records.

There is nothing to the contrary in *Heike vs. United States*, 227 U. S. 131. There, Mr. Justice Holmes decided only that the Fifth Amendment did not justify a claim of privilege against prosecution for crimes with which the matters testified thereto were but remotely connected, and consequently, the immunity afforded by the Act of February 25, 1903, 15 U. S. C. A. Section 32, should not be construed to reach them. That case too involved a corporation. The public records doctrine was not involved.

To sustain the government's contention would render Section 202 (g) of the Emergency Price Control Act meaningless for the Administrator could by mere regulation destroy its applicability to all matters other than verbal testimony. In the present case, the uncontroverted affidavit of Appellee (R-9) stated that the records which were produced in response to the subpoena were kept in the normal course of trade or business, although they were required to be kept by order of the Administrator. Under such circumstance, if these are considered public records, there could be no such thing as a private record. They involve the ordinary, regular business entries. To hold these records to be beyond the protection of Section 202 (g) would destroy completely the intended immunity therein provided. This cannot be under the authority of *Counselman vs. Hitchcock*, 142 U. S. 547. What Mr. Justice Brown said in *Hale vs. Henkel*, 201 U. S. 43, is extremely pertinent to the present case, involving an act as broad and as inclusive as the Emergency Price Control Act. He there said:

"we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the state. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the state or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the state, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the state, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights."

As argued in the brief filed on behalf of the petitioner in *Shapiro vs. United States*, No. 49, to be argued immediately preceding this case, Section 202 (g) was never intended to restrict the grant of immunity to oral testimony; for the Administrator may not only compel a person to appear and testify, but also to *appear and produce* documents, without oral testimony. The language in the Section is thus in the alternative. Needless to say, if as the government contends, the mere order of the Administrator that all customary records of an individual shall be kept and maintained for purposes of inspection and production, and if as a consequence such records would become public records, so that production of them could be compelled without a grant of immunity, there would be absolutely no protection to the individual under Section 202 (g), because in most cases oral testimony would be unnecessary. The statute should be construed to avoid the possibility of such facile circumvention.

Law enforcement, while important to the general welfare, should not be the basis for sacrificing what is equally important, namely, an individual's constitutional rights granted to him for the express purpose of safeguarding him against over-zealous law enforcement officers and improper methods of prosecution. As Mr. Justice Murphy, speaking for the court in the *United States vs. White*, 322 U. S. 694, 698, said "The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection of crime. While the privilege is subject to abuse and misuse, it is firmly embedded in our constitutional and legal frameworks as bulwark against iniquitous methods of prosecution."

In this day of increasing governmental regulation with its incidental but provocative invasion of the individual's privacy, courts should be alert to the danger of delimiting his protective rights and privileges. Price control is at an end. As such, the immediate problem here presented is important, in the narrow sense, only to the individuals involved. In the broader sense, however, the principles which this Court will lay down in this and the *Shapiro* cases, will be extremely far-reaching, and will directly affect the personal security of every member of society as against government intrusion. The protection afforded by the Fifth Amendment should not be circumscribed as the government demands. To repeat the warning of Judge Frank in the *Davis* case, *supra*, to destroy by judicial decision the fundamental constitutional right herein involved, would be to build up popular resistance to needed governmental action. It is submitted, therefore, that the judgment of the lower court on the merits of the motion to dismiss should be affirmed.

The government has raised in its brief, for the first time anywhere in this case, the point that it does not appear from the record that Appellee was sworn and

produced the records under oath. There are several answers to this.

In the first place, the government is urging this for the first time in this Court and it appears to be an afterthought. The case was heard in the court below on the single general issue of whether records required to be kept and which were produced in response to a subpoena were such as were entitled to immunity under Section 202 (g). Counsel appointed by the lower court did not contend that the records were not produced under oath. As appears from the transcript of record, one of such counsel was the very same person before whom the Appellee appeared for hearings at the Office of Price Administration at which time he produced his records. He certainly would have raised the point now advanced, if the same had merit.

In the second place, it is submitted that the government is in error when it states that it does not appear from the record that Appellee was sworn when he produced his records. The uncontroverted affidavit, filed in support of the motion to dismiss (R-9) states that the Appellee was subpoenaed to appear at the Office of Price Administration "to testify" and "to bring with him any and all records required" by the regulations; that Appellee did orally claim immunity; that notwithstanding this claim "the presiding officer at said hearing * * * did receive the records produced in response to the subpoena". This affidavit, it is submitted, is sufficient proof that Appellee was under oath in the absence of any proof to the contrary.

In the third place, Section 202 (g) of the Emergency Price Control Act does not require that a person claiming immunity must do so under oath. Congress in Section 202 (g) refers specifically to the Compulsory Testimony Act of February 11, 1893 which does not require an oath. It made no reference to any amendments to that Act, and particularly, to the Amendatory Act adopted June 30, 1906,

49 U. S. C. A., Section 48, which limited the immunity granted to natural persons who produce records under oath. It must be presumed that Congress in referring specifically to the Act of February 11, 1893, without reference to its amendments, did so deliberately and with full knowledge of the existence of the Act of 1906 and with the intention to exclude the latter Act from the Section. This is fortified by the fact that Section 202 (g) provides that the *immunity provisions* of the Act of 1893 shall apply with respect "to any individual" (part of the 1906 amendment) who specifically claims the privilege. To insert the additional requirement that the claim be under oath would be to amend Section 202 (g). As this Court said in *United States vs. Monia,* 317 U. S. 424, "It is not for us to add to the legislation what Congress pretermitted". Moreover, Section 202 (g) does not incorporate all of the Compulsory Testimony Act of February 11, 1893, but provides simply that the "immunity provisions" of that Act shall apply to any individual claiming a privilege.

Furthermore, there appears to be good and sound reason why Congress did not require that the production be under oath. The Administrator is not required to administer an oath but may do so or not as he chooses. See Section 202 (b). The Administrator may require an individual to appear and give testimony, or simply to appear and produce documents, or both, as in the present case. See Sections 202 (b) (e). Thus, obviously, the Administrator, while having the power to require the production of records without the taking of testimony and without the necessity for administering an oath, may circumvent Section 202 (g), if the provisions of the Act of 1906 are to be deemed part of that Section, as the government contends. The jeopardy of the individual being great, Congress must be presumed to have intended otherwise.

For all of the foregoing reasons, it is submitted that the government's position with respect to the state of the record and the requirement of an oath, is without merit.

II

The Appeal Should Be Dismissed

The appeal in the present case was not properly taken. The point herein involved is discussed by the Appellant in Footnote 2 on page 7 of its brief. In the United States Court of Appeals, Appellee urged that the appeal in the present case was filed in that court improperly and without authority (R-36). Counsel in the District Court were appointed by that court to prosecute the rule to show cause issued upon the complaint of the Administrator of the Office of Price Administration. Upon motion of the Appellee, the District Court dismissed its rule to show cause (R-30), after which an appeal was filed by the same attorneys originally appointed by the District Court. Appellee now contends, as it did in the Court of Appeals, that the appeal was not properly taken by the United States, not only for the reason that it is questionable whether the United States was a formal party to the action in the District Court, (*cf. United States ex rel W. Va. Pitts. Coal Co. vs. Bittner*, 11 F. 2nd 93 (4th Cir.)) as it certainly would have been if the proceeding had been by way of information, (*United States vs. Goldman*, 227 U. S. 229) rather than by complaint and rule to show cause, but for the additional reason that the appeal was prosecuted without authority by the attorneys appointed by the court.

It is a general rule that an attorney cannot, on his own motion, appeal from a judgment injuriously affecting the interests of a client without that client's consent. The authority of attorneys to represent parties in an original suit is at an end when the first judgment is rendered. *Brown vs. Grand Trunk Western Railway Co.*, 124 F. 2nd 1016 (6th Cir.). An argument to the effect that an attorney can appeal from an order entered by the same judge who appointed him and still maintain his authority to proceed is difficult to follow. The power of attorney must terminate upon the rendition of the judgment.

Furthermore, Appellee contends that all litigation involving the United States, criminal as well as civil, and particularly in appellate courts, is under the control and direction of the Attorney General. See *United States vs. San Jacinto Tin Co.*, 125 U. S. 274; *Sutherland vs. International Insurance Company of New York*, 43 F. 2nd 969 (2nd Cir.).

The Department of Justice did not enter this case until after briefs had been filed and the case set for argument, when the Acting Solicitor General moved the lower court to certify the case to this Court. This was more than five months after the date of appeal (R-30, 32). Appellee challenged the appeal on the ground that in the absence of a warrant of attorney authorizing the filing of the appeal in the present case by the Attorney General, a dismissal should be entered (R-37). Appellee does not believe that the intervention by the Solicitor General in the case five months after notice of appeal can justify an appeal theretofore taken without authority.

Appellee has found no case wherein the present problem has been presented, but is of the opinion that upon dismissal by a District Court of a rule to show cause in a contempt proceeding, the power of attorneys appointed by the very court passing on the rule should be limited. It is submitted therefore that the appeal should be dismissed.

CONCLUSION

It is respectfully submitted that the order of the District Court should be affirmed.

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SUPREME COURT OF THE UNITED STATES

No. 97.—October Term, 1947.

The United States of America, Appellant, v. James Hoffman.	Appeal From the District Court of the United States for the District of Columbia.

[June 21, 1948.]

Mr. Chief Justice Vinson delivered the opinion of the Court.

On Feb. 27, 1946, the Price Administrator filed a petition, in the District Court for the District of Columbia, to institute criminal contempt proceedings against appellee. The petition charged appellee with having made numerous sales of used cars at over-ceiling prices in violation of an injunction previously issued by the District Court. A rule to show cause was issued, but was dismissed on motion of the appellee, on the ground that he was entitled to immunity under § 202 (g) of the Emergency Price Control Act from prosecution for the transactions upon which the petition was founded. 68 F. Supp. 53.

The Government brought this appeal, under the provisions of the Criminal Appeals Act,[1] to review the decision of the District Court. The main issue is the same as that presented in the companion case, *Shapiro* v. *United States*, *ante* p. —, but two additional minor questions are raised:

1. Appellee urges that the appeal was not properly taken by the United States because the Government was not a party to the proceedings in the District Court. The

[1] 34 Stat. 1246, as amended by 56 Stat. 271, 18 U. S. C. Supp. V, § 682, and by § 238 of the Judicial Code as amended, 28 U. S. C. § 345.

record shows, however, that the litigation was instituted in that court by a petition of the OPA District Enforcement Attorney on behalf of the Price Administrator. When the rule to show cause was issued, the court appointed the United States Attorney and the OPA District Enforcement Attorney as "attorneys to prosecute the criminal charges contained in the petition filed herein on behalf of the Court and of the United States." See Rule 42 (b) of the Rules of Criminal Procedure, 327 U. S. 865–66. Thus the United States was, in any relevant sense, a party to the proceedings, and the appeal was properly brought under the Criminal Appeals Act. See *United States* v. *Goldman*, 277 U. S. 229, 235 (1928); *Ex parte Grossman*, 267 U. S. 87, 115 *et seq.* (1925).

2. The Government mentions a further consideration, not involved in the *Shapiro* case. The record does not state that the appellee was sworn and produced the records under oath, a condition precedent to the attainment of immunity under a 1906 Amendment, 49 U. S. C. § 48, to the Compulsory Testimony Act of 1893. It is unnecessary to consider this contention both because it does not appear to have been duly raised in the court below, and because the grounds considered and the views set forth in our opinion in the *Shapiro* case suffice to dispose of this appeal.

The decision of the District Court is reversed and the case remanded for further proceedings.

Reversed.

MR. JUSTICE FRANKFURTER dissents for the reasons stated in his dissenting opinion in *Shapiro* v. *United States*, *ante* p. —. MR. JUSTICE JACKSON and MR. JUSTICE MURPHY dissent for the reasons stated in MR. JUSTICE JACKSON's dissenting opinion in *Shapiro* v. *United States*, *ante* p. —. MR. JUSTICE RUTLEDGE dissents for the reasons stated in his dissenting opinion in *Shapiro* v. *United States*, *ante* p. —.